

United States v. Johnson, No. 05-50830

APR 04 2008

TASHIMA, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent because this disposition is contrary to binding circuit precedent.

Johnson was sentenced to a 120-month term of imprisonment for possession of crack cocaine with intent to distribute. At the sentencing hearing, this exchange occurred between counsel for defendant and the court:

[MR. SALSEDA:] Finally, Your Honor, we've argued that the crack cocaine guidelines are overstated. One, they overstate this particular man's maliciousness. Two, they create unwarranted disparity. There's an unwarranted disparity between crack and pot or cocaine, and it's been shown this has a disproportionate impact on African-Americans. Specifically, if the same amount of cocaine base or cocaine powder and all things were the same, Mr. Johnson would be in a guideline range of 27 to 33 months.

THE COURT: Statistics don't show any difference really in terms of those matters which are when you compare what happens to Hispanics in terms of methamphetamine and cocaine, it just doesn't make any difference, or heroin, they're all the same. And the problem is that's a question for Congress to decide.

In *United States v. Casteneda*, 511 F.3d 1246 (9th Cir 2008), the sentencing court similarly stated:

I don't believe it's appropriate for the Court to specifically reduce a sentence under 18 U.S.C. 3553(a) on the basis that the Congress and the U.S. Sentencing Commission are wrong in establishing different penalties for different types of controlled substances. . . . To the extent the difference in penalties are out of whack, it's for the Congress to change them, not this

trial court.

Id. at 1248-49 (alteration in the original). Based on the foregoing colloquy, because the sentencing court’s “statements demonstrate[d] that the district court did not foresee the extension of its *Booker* discretion that would be announced . . . in *Kimbrough*,” we vacated the sentence and remanded for the district court “to reconsider the sentence in light of the *Kimbrough* decision and to determine whether the disparity between crack and powder cocaine produced a sentence ‘greater than necessary’ under § 3553(a).” *Id.* at 1249.

Given the similarity in circumstances, *Casteneda* controls this case.¹ Because I would vacate the sentence and remand for resentencing in light of *Casteneda*, I respectfully dissent.

¹ The majority attempts to distinguish this case from *Casteneda* by concluding that “[t]he court’s comment about Congress concerned minimum sentences, not the disparity between crack and powder cocaine.” While it is true that some of the court’s comments concerned statutory minimum sentences, immediately after those comments defense counsel correctly stated that “in this case . . . there’s no mandatory minimum,” to which the court replied: “Well, I understand that,” and moved on to other matters.